Supreme Court, U.S.
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No. 86-417

In the Supreme Court of the United States

OCTOBER TERM, 1986

NORMAN GARDNER, RAMONA WALHOF, JOHN CHEADLE,

Petitioners,

VS.

JOHN V. EVANS, MARTY PETERSON, LAWRENCE W. BARNES, JACK UGAKI, HOWARD BARTON,

Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI TO THE SUPREME COURT FOR THE STATE OF IDAHO

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I. THE PETITION FOR CERTIORARI WAS TIMELY FILED

Respondents argue that certiorari should not be granted because the petition was not timely filed. Respondents' argument is without merit for three reasons.

First, the Idaho Rules of Appellate Procedure provide in cases such as the one *sub judice* that "[o]pinions shall become final 21 days after . . . [t]he announcement of the opinion." IDAHO R. APP. P. 38(b)(1) at A. 55. The remittitur issues "[w]hen the opinion filed has become final in accordance with this rule." IDAHO R. APP. P. 38(c) at A. 55. Rule 38 of the Idaho Rules of Appellate Procedure is in accord with the representation made to Mr. Le Clercq in June 1986 by the Office of the Clerk of the Idaho Supreme Court. Petition for Certiorari at 2. Moreover, the past unambiguous holdings of the Idaho Supreme Court and statements by its members make clear that the entry of the remittitur by the Idaho Supreme Court constitutes its final judgment. *See*, for example, *Farber v. State*, 106 Idaho 677 at 680 n.1, 682 P.2d 630 (1984) (Justice Bistline, concurring, stated that it had been his "impression over the last eight years" as a justice that an Idaho Supreme Court decision was not "a final judgment . . . [until] the remittitur had issued."[1] As this Court observed in *N.A.A.C.P. v. Alabama*, 357

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[1]*Accord, Ross v. Ross*, 103 Idaho 406 at 417, 648 P.2d 1119 (1982) (Bistline, J., concurring and dissenting on other grounds) ("until such an appeal is disposed of and upon remittitur, the case does indeed fall into limbo"); *id.* at 103 Idaho 419 n.3 (Bakes, C.J., dissenting on other grounds); *Jensen v. Doherty*, 101 Idaho 910 at 911, 623 P.2d 1287 (1981) (Bistline, J., dissent-

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U.S. 449, 457-58 (1958): "Novelty in procedural requirements cannot be permitted to thwart review in this Court

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ing on other grounds) ("If not appealed from the judgment would have gained res judicata effect which it also will have on the remittitur."); *Hutchins v. State,* 100 Idaho 661 at 665, 603 P.2d 995 (1979) ("When the cause was back in trial court after remittitur. . . ."); *State v. Scroggins,* 110 Idaho 380, 716 P.2d 1152 (1985) (the power of the Supreme Court to recall its remittitur to further consider its earlier judgment); *State v. Blevins,* 108 Idaho 239 at 244, 692 P.2d 1174 (district judge directed to modify its judgment upon receiving remittitur); *State v. Hoak,* 107 Idaho 742 at 751, 692 P.2d 1174 (1984) (Judge Bistline concurring and dissenting on other grounds); ("after the remittitur went down"); *Steiner v. Amalgamated Sugar Co.,* 106 Idaho 111 at 115, 675 P.2d 826 (1984) ("Upon remittitur, we direct the trial court to modify its judgment. . . ."); *State v. Bylama,* 103 Idaho 473 at 475, 648 P.2d 1119 ("This rule allows the sentencing judge to reduce a sentence within 120 days after receipt of the remittitur affirming the judgment"); *Kifer v. School District,* 100 Idaho 411 at 412, 599 P.2d 302 (1979) (Shepard, J., dissenting on other grounds) ("I am at a loss to understand the posture which this case will assume on the issuance of this Court's remittitur"); *State v. One 1955 Willy Jeep,* 100 Idaho 150 at 157, 595 P.2d 299 (1979) (Bistline, J., dissenting on other grounds), (" 'Defendants now prosecute this appeal from the judgment of the superior court entered pursuant to the remittitur of the District Court of Appeal' "); *State v. Adams,* 99 Idaho 75 at 86, 577 P.2d 1123 (1978) (". . . upon the remittitur going down . . . the 120 day retention of jurisdiction becom[es] an effective part of the sentence"); *Avondale Irrigation Dist. v. North Idaho Properties,* 96 Idaho 1 at 5, 523 P.2d 818 (1974) ("If there is no motion to reopen within thirty days after the remittitur issues herein, the judgment of the district court shall be in all respects final"); *Martin Estate v. Woods,* 94 Idaho 870 at 871, 499 P.2d 569 (1972) ("On appeal to this court, the district court dismissal was reversed and the cause remanded for trial. . . ." Following trial on the merits, after remittitur . . ."); *Berry v. District Court,* 91 Idaho 600 at 603, 428 P.2d 519 (1967) (Smith, J., joined by Taylor, J., dissenting on other grounds) ("On remittitur, the district court entered findings of facts"); *Darrar v. Joseph,* 91 Idaho 210 at 214, 419 P.2d 211 (1966) ("Any further orders . . . will be made by the district court, after remittitur herein"); *Minidoka County v. Krieger,* 88 Idaho 395 at 418, 399 P.2d 962 (1965) ("reasonable attorney fees on the appeals to be incoroprated upon remittitur").

applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." Justice Holmes once said: "Whatever springes the State may set for those who are endeavoring to assert rights the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis v. Wechsler,* 263 U.S. 22, 24 (1923).

Whatever inroads may have been made on the final judgment rule of 28 U.S.C. § 1257 to *permit* reviewability of federal questions,[2] Rule 20.4 of the Rules of the Supreme Court, if fairly construed in accordance with the finality rule of 28 U.S.C. § 1257, must not *deny* review of federal questions on entry by the state court of its final judgment — in this case the entry of the remittitur on June 13, 1986.

Second, the efficiency and federalism interests which underlie the final judgment rule of 28 U.S.C. § 1257 are not compromised by permitting review in this case. The "want of harmony" of Supreme Court decisions with respect to the final judgment rule results from the "varying forms in which state courts have expressed their action." *Norfolk & S. Turnpike Co. v. Virginia,* 225 U.S. 264, 268 (1912). The "want of harmony" among decisions of this Court due to the "varying forms" of state expression reflects the deference this Court owes to the principles of federalism. It would be especially cruel to reject for want of timeliness a petition involving substantial federal claims (rejected out of hand by the state courts) because

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[2]See, e.g., Frank, "Requim for The Final Judgment Rule," 45 Texas L. Rev. 292 (1966).

out of state counsel counted the ninety days within which the petition must be filed in reliance on 28 U.S.C. § 1257; Idaho Appellate Rule 38(b) and representations by the Office of the Clerk of the Idaho Supreme Court that, under Idaho practice, the entry of the remittitur on June 13, 1986 constituted the final judgment.

Third, for the Court to reject this petition for lack of timeliness would be inconsistent with the literal language of 28 U.S.C. § 1257 and with the strong federal policy favoring federal review of substantial federal questions litigated in the state courts.

Rule 58(b) of the Federal Rules of Civil Procedure was modified several years ago to require that "[e]very judgment shall be set forth in a separate document." This was "done mainly to clarify and make certain what should be treated as a judgment and . . . in order to eliminate confusion." 6A MOORE'S FEDERAL PRACTICE § 58.01 at 58-4 (1986) Idaho appellate courts set forth their final judgments in a separate document styled a remittitur. IDAHO APP. R. 38(c). The same important federal polices which led to the amendment of Federal Rule 38 mitigate strongly in favor of the Court's acceptance of the petition as timely filed.

Counsel for respondents sought and obtained extensions of time in this proceeding from both the Idaho Supreme Court and the United States Supreme Court. In neither instance, did petitioners object to the extension.[3]

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[3]This is not the first attempt of respondents to prevent petitioners from being heard on the merits of important issues in the case. Respondents consistently characterized petitioners' fed-

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Many thousands of dollars have been spent on discovery, pre-trial motions and appeal of this case. Both the Idaho district court and the Idaho Supreme Court made short shrift of petitioners' federal claims. Petitioners in good faith and in accord with 28 U.S.C. § 1257 and Idaho practice, relied on and counted the ninety days within which their time for filing the petition commenced to run from June 13, 1986 when the remittitur was filed. The issues presented in this case are too important to the individual petitioners and to the blind people of Idaho and the United States to pretermit petitioners' only mode of federal review of their substantial federal claims. Respondents' timeliness objection should be rejected and the petition for certiorari granted. The remittitur in this case is the same type of judgment the Court found to be within the scope of its review in *Puget Sound Power & Light Co. v. King County*, 264 U.S. 22, 24-25 (1924).

The disposition of the timeliness defense urged here accords with the important fact that most lawyers seek re-

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eral claims as "frivolous" in the state courts and sought an award of attorney fees on that basis. Respondents contended that petitioners "did not timely file objections to costs and attorney's fees and therefore waived all rights to object." Memorandum Opinion and Order of District Court filed May 31, 1985 at R. 350-51. The District Court held that respondents' petition for fees was "prematurely filed." *Id.* at 351. Counsel for respondents also attempted to prevent petitioners from being heard in the early stages of this litigation by serving notices only on *local* counsel without service on out-of-state counsel responsible for the prosecution of the litigation. *See* affidavit of Marc Maurer of September 19, 1984 par. 8 at R. 312-13. Subsequently, counsel for respondents scheduled a hearing for a protective order against further discovery without notice to out-of-state counsel. *Id.* at par. 9.

view of cases in the United States Supreme Court only several times in their professional lives. A construction by this Court of its rules which is widely at variance with the language of § 1257 or which attributes a radically different meaning to finality than that of the state court from which review is sought compromises standards of reasonable predictability under § 1257 and constitutes a Draconian hazard for the practicing lawyers whom this Court serves. *Cf. Henry v. Mississippi*, 379 U.S. 443 (1965).

For the Court to decline certiorari for want of timelinesss would intrude heavily on the federalism interests of § 1257 and the strong federal policy against piecemeal review. The construction of Rule 20.4 sought by respondents would require counsel in states with final judgment rules similar to that of Idaho[4] to file protective petitions to adverse opinions in advance of final judgment to avoid the harsh prospect that failure to do so may preclude review entirely.

This Court should reject the lack of timeliness argument of respondents or, alternatively, grant certiorari and

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[4]*See*, e.g., *Garrett v. Garrett*, 30 Colo. App. 167, 505 P.2d 39 at 40 (1971) (Appellate rule that mandate of Court of Appeals shall issue 15 days after entry of judgment is intended to establish finality); *O.P. Corp. v. North Palm Beach*, 302 So.2d 130 (Fla. 1974) (issuance of mandate constitutes final judgment of appellate court); *Borrow v. El Dorado Lodge Inc.*, 75 Az. 218, 254 P.2d 1027 at 1028 (1953) ("The original opinion of this court did nothing more than affirm the orders of the trial court. . . . [T]he time for performance . . . commences to run from the time the appellate court's judgment or order becomes effective, viz. under our practice, the date of the issuance of the mandate.") A preliminary review of the cases suggest that this problem could occur in several states.

reserve the jurisdictional issue for briefing and argument on plenary consideration of this case.[5]

Respectfully Submitted,

Frederic S. Le Clercq
Attorney for Petitioners

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[5]Counsel did not lodge a copy of the portions of the record on which petitioners relied, Petition for Certiorari 2 n.1, nor request certification of the record by the Clerk, because of the policy against such requests prior to the grant of certiorari. U.S. Supreme Court Rule 19.1.